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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re TERRY K., a Person Coming Under the Juvenile Court Law.	
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. ERIC R., Defendant and Appellant.	C039673 (Super. Ct. No. JD216676)

Eric R. (appellant), the biological father of the minor, appeals from the juvenile court's order terminating parental rights. (Welf. & Inst. Code, §§ 366.26, 395, further undesignated statutory references are to this code.) Appellant claims his due process and equal protection rights were violated by the juvenile court's termination of his parental rights without a finding that he is an unfit parent, by the court's

failure to appoint him counsel, and by the court's failure to make an adequate paternity inquiry. Appellant also argues there was a failure to comply with the Indian Child Welfare Act. (25 U.S.C. § 1902, et seq.) We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2001, the Sacramento County Department of Health and Human Services (DHHS) filed a dependency petition concerning the newborn minor after the mother tested positive for the presence of methamphetamine at the time of the minor's birth. The minor was born at 30 weeks gestation, weighing 2 pounds, 14 ounces. The minor's three siblings were also the subjects of dependency proceedings.

Kevin K., who was the mother's husband, was listed as the minor's father in the petition, but both he and the mother reported that he was not the minor's biological father. According to the mother, the minor was the product of an extra-marital affair and "she and her husband ha[d] decided that they [we]re not willing to provide care" for the minor, although they wished to reunify with the minor's siblings.

At the detention hearing, after determining that the mother and Kevin K. had been married for 12 years, the juvenile court stated that Kevin K. appeared to be a "conclusively presumed father." The court asked whether anyone wished to voir dire or contest the presumption. The minor's attorney noted the information in the detention report suggesting that Kevin K. was not the minor's biological father. According to his attorney, Kevin K. did not intend to rebut the presumption of paternity

and intended to sign a relinquishment of the minor, as did the mother. The minor's attorney interrupted the court as it was questioning the mother and Kevin K. about their intent to relinquish the minor, again stating her concern about going forward with a relinquishment "without giving the other father a chance to come forward." The mother stated: "He's unknown. I don't know where he's at." Shortly thereafter, the mother again responded in the negative when asked by the court if she knew who the minor's father was. In response to the court's inquiry, none of the parties indicated they wished to rebut the presumption that Kevin K. was the minor's father. The court then declared Kevin K. the minor's presumed father and entered a judgment of paternity to that effect.

According to a subsequent report, the mother told the social worker that Kevin K. and she had separated after a domestic violence incident in August 2000 and that they were currently "trying to resolve their problems."

At the jurisdictional hearing in May 2001, the juvenile court sustained the petition and accepted a relinquishment of the minor from the mother and Kevin K. The minor's attorney again raised her concerns that the presumed father was not the biological father and noted that the mother had named a potential father, who was incarcerated. The attorney for DHHS then told the court that the adoptions worker had provided appellant's name as an alleged father and the attorney had instructed the adoptions worker to provide notice of the proceedings to appellant. The juvenile court directed the clerk

to send notice to appellant as well. The court set the matter for a hearing to select and implement a permanent plan pursuant to section 366.26.

Notice of the section 366.26 hearing was sent to appellant by certified mail in May 2001. Notice was also personally served on appellant in June 2001.

In July 2001, DHHS filed a petition for modification requesting paternity testing of appellant pursuant to his written request. In August 2001, the juvenile court granted the modification, directing that paternity testing be arranged "as quickly as possible." The court also directed the social worker to prepare an assessment of appellant to determine whether it would be in the minor's best interests to offer reunification services to him.

According to a report in August 2001, paternity testing had not yet been arranged because the social worker needed a written order. The court continued the section 366.26 hearing for 30 days to allow paternity testing to be completed.

An addendum report contained information regarding appellant's criminal record, which included convictions for spousal battery, burglary, possession of a controlled substance, evading peace officers, and vehicle theft. Appellant was serving his third prison commitment, a 32-month sentence. According to the case records analyst at appellant's facility, appellant was scheduled to be released from prison in May 2003. Although the social worker did not have the paternity results at the time that the addendum was prepared, she recommended denying

services to appellant pursuant to section 361.5, subdivision (e)[1], based on his lack of a relationship with the minor, his lengthy criminal record, the length of his current prison sentence, and because services were limited to six months due to the minor's age.

Paternity testing established a 99.83 percent likelihood that appellant is the minor's biological father. In September 2001, appellant signed a Judicial Council form entitled "Statement Regarding Paternity," in which he stated that he believed he was the minor's father and requested that the court appoint him counsel.

At the section 366.26 hearing in October 2001, the juvenile court noted it had received appellant's statement regarding paternity. The court found appellant to be the minor's biological father based on the paternity testing, but declined to appoint counsel for appellant because he was not a presumed father and would not be entitled to services. The court noted that, although appellant had made a reasonable effort to come forward since being advised of the proceedings, appointment of counsel "w[ould] only unduly delay this and not change the ultimate outcome." The court terminated parental rights and ordered a permanent plan of adoption.

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[1] Section 361.5, subdivision (e), addresses the provision of reunification services to incarcerated parents. (See discussion, *post*.)

DISCUSSION

Appellant contends he was denied due process and equal protection because his parental rights were terminated without a finding that he is an unfit parent and without the appointment of counsel. He also argues that the juvenile court did not make an adequate paternity inquiry and, as a result, he was denied an opportunity to be heard. Respondent contends that appellant lacks standing to raise these issues on appeal and, in any event, that he was not denied due process because he is not a "legally recognized parent." Although we find that appellant has standing, he cannot prevail.

"Only parties of record may appeal." (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.) "A party of record is a person . . . who takes appropriate steps to become a party of record in the proceedings." (*Ibid*.) In *In re Emily R.* (2000) 80 Cal.App.4th 1344, 1356, the court held that an alleged father in a dependency proceeding does not become a party "until he appear[s] and assert[s] a position." Similarly, in *In re Joseph G.*, *supra*, 83 Cal.App.4th 712, an alleged biological father who had not requested "a finding of paternity, blood testing, reunification, or any other relief," despite being provided notice of the proceedings, did not have standing because he had failed to take advantage of the opportunity to become a party. (*Id*. at pp. 714, 716.)

Here, appellant took immediate steps to become a party once he was notified of the dependency proceedings. He communicated to the social worker his desire to undergo paternity testing.

He completed a statement of paternity setting forth his belief that he is the minor's father. He requested appointment of counsel. Thus, appellant did what he could, in light of his incarceration, to "appear[] and assert[] a position." (*In re Emily R.*, *supra*, 80 Cal.App.4th at p. 1356.)

Furthermore, unlike the alleged fathers in *In re Emily R.*, *supra*, 80 Cal.App.4th 1344, and *In re Joseph G.*, *supra*, 83 Cal.App.4th 712, appellant's biological relationship to the minor had been established, giving appellant at least an inchoate interest in the minor. (See *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1052.) Appellant's request for a declaration of paternity in his favor and for appointment of counsel were attempts to assert this interest. Under such circumstances, we find that appellant has standing on appeal to raise issues concerning his parental interests in the minor.[2]

We turn to appellant's substantive arguments. Appellant claims he is "entitled to the same due process protections afforded unwed fathers who father children with unwed mothers" because the minor's mother and her husband did not intend to raise the minor. Appellant argues that the conclusive presumption of paternity (and, by inference, the judgment of paternity) should give way in this case to his interest as a

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[2] Appellant contends, and respondent concedes, that this appeal is not barred by appellant's failure to file a petition for extraordinary writ pursuant to California Rules of Court, rule 39.1B. We agree. (See *In re Rashad B.* (1999) 76 Cal.App.4th 442.)

biological father because there was no existing family unit to disrupt and the presumed father relinquished the minor. Appellant engages in a lengthy analysis of the compelling, and sometimes prevailing, interests of biological fathers in being given an opportunity to parent their natural children under certain circumstances. He presents a strong argument for granting status equivalent to a presumed father to a biological father when the presumed father intends to relinquish the child at birth and the biological father has been prevented from becoming a presumed father solely by the child's mother. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816.)

However, in appellant's case, it would be an academic exercise for us to resolve the complexities presented here, because appellant's failure to demonstrate prejudice is dispositive.

In the context of dependency proceedings, due process violations have been held subject to the harmless-beyond-a-reasonable-doubt standard of prejudice. (See *In re Angela C.* (2002) 99 Cal.App.4th 389 [inadequate notice of the termination of parental rights hearing]; *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377 [denial of contested permanency planning hearing]; *In re Dolly D.* (1995) 41 Cal.App.4th 440, 446 [denial of right to confront and cross-examine witnesses]; *In re Laura H.* (1992) 8 Cal.App.4th 1689, 1696 [absence of parent's attorney during examination of minor in termination of parental rights proceeding]; *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1377 [parent's waiver of rights].) Applying this most stringent test

of prejudice to the present matter, we find no prejudice. (See *In re Laura H.*, *supra*, 8 Cal.App.4th at p. 1696.)

Section 361.5, subdivision (e)(1) sets forth criteria for determining whether to grant reunification services to incarcerated parents. This section provides, in relevant part: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, and any appropriate factors. *Reunification services are subject to the applicable time limitations imposed in subdivision (a)*." (Italics added.) Section 361.5, subdivision (a)(2) limits reunification services to no more than six months for a child who is under the age of three years when removed from the parent, as the minor was here.

Appellant's length of incarceration alone precluded him from reunifying with the minor within the statutory time, which, based on the minor's age, is six months. The case records analyst at appellant's prison facility reported that appellant would not be released from prison until May 2003. Thus, appellant was expected to be incarcerated for 17 more months at

the time of the section 366.26 hearing. Even if appellant was able to overcome the numerous obstacles in his path to establishing that he should be granted presumed father status, he would not have been entitled to reunification services under these circumstances.[3]

Appellant has failed to suggest any information he could have presented that would have altered this conclusion had the alleged errors not occurred. "[O]ur duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) Appellant suggests he might have been able to present information regarding an earlier possible parole date and that

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[3] The formidable obstacles in appellant's path included overcoming the conclusive presumption of paternity (Fam. Code, § 7540) and setting aside the judgment of paternity (Fam. Code, § 7636) as well as establishing that the blood test evidence of appellant's paternity was admissible to overcome the conclusive presumption of paternity (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 240), demonstrating that the minor's mother unilaterally precluded him from receiving the minor into his home (thereby, preventing him from becoming a presumed father under Fam. Code, § 7611, subd. (d)), and demonstrating that he promptly attempted to assume his parental responsibilities and demonstrated a willingness to assume full custody of the child, rather than merely blocking adoption by others, once he learned of the minor's existence. (*Adoption of Kelsey S., supra,* 1 Cal.4th at pp. 849-850.)

the release date provided by the prison administration may not have taken into account conduct credits. There is no basis in the record for doubting the accuracy of the release date or for concluding that appellant would be able to complete his remaining 17 months of incarceration in less than 6 months. Nor does appellant claim he could have presented information establishing that he would be released in time to reunify with the minor; he merely asserts that he was never provided an opportunity to be heard in this regard. This does not amount to a showing of prejudice.

Appellant's argument concerning the failure to appoint him counsel is similarly ill-fated. Appellant argues he had both a constitutional right and a statutory entitlement to appointed counsel. The federal Constitution does not require the appointment of counsel in all termination of parental rights proceedings. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 31 [68 L.Ed.2d 652].) "[W]hether a due process right to counsel existed at the lower court hearing depends on whether the presence of counsel would have made a 'determinative difference' in the outcome of the proceeding." (*In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1196, citing *Lassiter v. Department of Social Services*, *supra*, 452 U.S. at p. 33 [68 L.Ed.2d at p. 653].)

Section 317, subdivision (b) provides for the appointment of counsel for a "parent" who cannot afford counsel when the child is placed in out-of-home care. Assuming that appellant was a "parent" entitled to counsel under the statute, numerous

cases have applied a prejudice analysis in evaluating whether the absence of counsel at a termination of parental rights proceeding was grounds for reversal. (See *In re Malcolm D.* (1996) 42 Cal.App.4th 904 [deprivation of counsel at section 366.26 hearing]; *In re Ronald R.*, *supra*, 37 Cal.App.4th 1186 [deprivation of counsel at six-month review]; *In re Andrew S.* (1994) 27 Cal.App.4th 541, 543-544 [deprivation of counsel at section 366.26 hearing]; *In re Mario C.* (1990) 226 Cal.App.3d 599, 606 [appointment of separate counsel for children].)

Appellant claims he was prejudiced by the failure to appoint counsel because he was prevented from showing that he was a *Kelsey*[4] father. Even if appellant had been represented by counsel and was able to demonstrate that he should be granted presumed father status, the criteria under section 361.5, subdivision (e) would have precluded reunification services. As the appointment of counsel would not have made a determinative difference in the outcome of the proceedings, appellant did not have a constitutional right to appointed counsel. Similarly, we find that appellant was not prejudiced by any statutory

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[4] *Adoption of Kelsey S., supra,* 1 Cal.4th at page 849, held that federal constitutional guarantees of due process and equal protection are violated when an unwed father is unilaterally precluded from becoming a presumed father by the child's mother, if he "promptly comes forward and demonstrates a full commitment to his parental responsibilities - emotional, financial, and otherwise . . . ." *Kelsey S.*, *supra*, did not involve more than one presumed or potential presumed father.

violation attendant to the juvenile court's failure to appoint counsel.

Appellant also asserts he was prejudiced because no inquiry was made regarding his Indian heritage or regarding paternal relatives who might have wanted to care for the minor and because he was not able to be heard on "any issue related to the placement of [the minor] for adoption." Again, appellant fails to make an adequate showing of prejudice on any of these bases. (*Paterno v. State of California, supra*, 74 Cal.App.4th at p. 106.)

In a related argument, appellant claims the juvenile court erred by failing to conduct a paternity inquiry at the detention hearing, as required by section 316.2. According to appellant, an earlier paternity inquiry would have led to earlier notice to him and an opportunity to develop a relationship with the minor before the hearing at which parental rights were terminated. We disagree.

Section 316.2, subdivision (a) requires the juvenile court, at the detention hearing, to "inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers." The presence at the hearing of a man claiming to be the father does not relieve the court of this duty. The section enumerates specific inquiries for the court to make "as the court deems appropriate."

At the detention hearing in the present matter, the minor's mother indicated that the identity and whereabouts of the biological father were unknown. The court had no reason to

suspect that further inquiry would have proved fruitful at this juncture. When appellant's identity became known shortly after the detention hearing, both state adoptions and the court provided appellant with notice of the proceedings. Thus, even if the court's failure to make each of the inquiries contained in section 316.2, subdivision (a) could be considered error when to do so appeared to be futile, appellant was not prejudiced by the brief delay occasioned thereby.

In conclusion, we note the provision in our state Constitution that "[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of pleading, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Thus, "generally, error involving the infringement of a constitutional right, like any other error, requires a further determination whether the defendant has been prejudiced, and the final test is the 'opinion' of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily where the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered." (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

We find the errors alleged by appellant were harmless beyond a reasonable doubt.

DISPOSITION

The juvenile court's order is affirmed.

SIMS, Acting P.J.

We concur:

MORRISON, J.

KOLKEY, J.